BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH E. CROUSE	)	
Claimant	)	
VS.	)	
	)	Docket No. 259,606
O'REILLY AUTO PARTS	)	
Respondent	)	
AND	)	
	)	
UNIVERSAL UNDERWRITERS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on January 3, 2001.

ISSUES

Respondent contends that claimant failed to prove that he suffered an accidental injury arising out of and in the course of his employment, that timely notice was given and also alleges the ALJ erred by granting claimant's motion to amend his date of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[3]

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[1] K.S.A. 1999 Supp. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[2] K.S.A. 1999 Supp. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 1999 Supp. 44-501(g).

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[4] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[5]

This case presents a close question. Respondent has presented evidence which calls into question claimant's version of events. But after reviewing the record and considering the arguments, the Board finds that the Order by the ALJ should be affirmed. The ALJ accepted claimant's version of the events indicating he suffered a low back injury on May 22, 2000 followed by a gradual worsening or a series of aggravations through his last day worked, on or about June 15, 2000, and that he gave timely notice of accident to his supervisor, Cody Zimmerman. The ALJ had the opportunity to observe the testimony of the claimant and the store manager, Mr. Zimmerman. The ALJ obviously found the claimant to be a credible witness and accepted his description of the events. The Board generally gives some deference to the ALJ's assessment of credibility of witnesses who have testified before the ALJ. After reviewing the record, the Board concludes it is reasonable to do so in this case and, therefore, affirms the decision of the ALJ ordering an independent medical evaluation as specified in the preliminary hearing Order.

Finally, respondent contends the ALJ erred by granting claimant's oral motion at the preliminary hearing to amend his date of accident. The ALJ and the Board are not bound by technical rules of procedure and are to give the parties a reasonable opportunity to be heard and present evidence.[6]

Furthermore, the pleadings do not control the trier of facts' determination of the issue. A similar argument was raised in Lott-Edwards[7] concerning the nature and extent of claimant's disability. In that case, the claimant alleged a permanent partial disability but the Board found a permanent total disability. The Court of Appeals held that because the nature and extent of the claimant's disability was a question of fact for the Board to determine based upon substantial competent evidence, the pleadings did not control that determination. In this case, the date or dates of accident is likewise a question of fact to be determined from the evidence.[8]

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[4] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

[5] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

[6] K.S.A. 44-523; McKinney v. General Motors Corp., 22 Kan. App. 2d 728, 921 P.2d 257 (1996).

[7] Lott-Edwards v. Americold Corporation, 27 Kan. App.2d 689, 6 P.3d 947 (2000).

[8] *See* Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

But because a resolution of this issue is not necessary to determine the substantive issues or the claimant's entitlement to preliminary hearing benefits, the Board does not have jurisdiction to decide this issue on an appeal from a preliminary hearing order.[9]

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[10]

WHEREFORE, it is the finding, decision, and order of the Board that the Order entered by Administrative Law Judge Nelsonna Potts Barnes on January 3, 2001, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Mark O. Sanderson, Kansas City, MO
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

[9] *See* K.S.A. 44-551 and K.S.A. 44-534a. *See also* Carpenter v. National Filter Service, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[10] K.S.A. 44-534a(a)(2).